

Talking Points:

- **In November 2016, activists started protesting the AES corporation's disposal of coal ash in landfills in the Puerto Rican municipalities of Peñuelas [pen – way – los] and Humacao [hoo – muh – cow].**
- **Protests were born out of the 2015 Puerto Rico Supreme Court decision to prohibit the use of coal ash as construction fill material.**
- **In 2015, EPA finalized the federal rule which addresses the disposal of coal ash.**
 - **The rule provides for the safe disposal of coal ash in lined permitted sanitary landfills.**
- **The 2015 Puerto Rico Supreme Court decision is valid and enforceable but does not apply to the disposal of coal ash in permitted landfills.**

Background:

Coal Combustion Residuals (CCR) Rule:

- In 2015, the U.S. Environmental Protection Agency finalized national regulations to provide for the safe disposal of coal combustion residuals from coal-fired power plants.
- This groundbreaking rule is the culmination of extensive study on the effects of coal ash on the environment and public health.
- The rule establishes technical requirements for landfills and surface impoundments under Subtitle D of the Resource Conservation and Recovery Act (RCRA), the nation's primary law for regulating solid waste.
- EPA carefully evaluated more than 450,000 comments on the proposed rule, testimony from eight public hearings, and information gathered from three notices soliciting comment on new data and analyses. The final rule makes a number of changes from the proposal including providing greater clarity on technical requirements in response to questions received during the comment period.
- EPA is also establishing recordkeeping and reporting requirements under this final rule, including the online posting of annual groundwater monitoring and corrective action reports, CCR fugitive dust control plans and closure completion

notifications. EPA is committed to work closely with the states.

- Permitted municipal solid waste landfills (MSWLFs) are not subject to the requirements of EPA's CCR rule. Thus, federal law does not prohibit the disposal of CCRs in a permitted MSWLF that operates in full compliance with the criteria for MSWLFs, set forth at 40 CFR Part 258, or the use of CCRs as daily cover at such a permitted landfill. States (and the Commonwealth of Puerto Rico) are free to establish more stringent requirements if they wish.

Water Infrastructure Improvements Act for the Nation (WIIN) Act of 2016:

- While the Act primarily deals with water resources and water infrastructure, it contains a separate subtitle (Subtitle C of Title II) dealing with the control of coal combustion residuals (CCR). Title II of the Act is called the "Water and Waste Act of 2016." Subtitle C of Title II is captioned "Control of Coal Combustion Residuals." It adds a new subsection (d) to sec. 4005 of RCRA, entitled "State Programs for Control of Coal Combustion Residuals,".
- The new provision says that each state can submit to EPA, for approval, a permit program for regulation of CCR units that, after approval by EPA, will operate *in lieu of* EPA's CCR Rule (40 CFR Part 257 Subpart D). Any such state permit program must require each CCR unit to achieve compliance with either the criteria in EPA's CCR Rule or such other state criteria that EPA determines to be *at least as protective* as the criteria in EPA's CCR Rule. Once a state submits such a permit program to EPA for approval, EPA has to act on it within 180 days.
- The bill provides that if any state chooses not to submit such a permit program, then subject to the availability of appropriations for this purpose, EPA shall implement a federal permit program to require each CCR unit located in that state to achieve compliance with the applicable criteria in EPA's CCR Rule. EPA's CCR Rule shall continue to apply to each CCR unit in a state unless (A) a permit under a state permit program approved by EPA is in effect for the CCR unit; or (B) a permit issued by EPA in a non-participating state is in effect for the CCR unit.
- The bill provides that EPA may use the authority provided by sections 3007 and 3008 of RCRA to enforce the prohibition on open dumping under subsection 4005(a) with respect to a CCR unit. If the unit is in a state with a CCR permit program that's been approved by EPA, then there are certain limitations on EPA's ability to bring a 3008 enforcement action.

Current and Future Actions:

- Since mid-November 2016, citizens and municipalities have strengthened the opposition against the disposal of AES CCRs at the landfills in the municipalities of Peñuelas (Peñuelas Valley Landfill and Ecosystems Landfill) and Humacao (Coqui Landfill). Dozens of activists were arrested as they blocked the entrance of trucks with AES ashes to the Peñuelas landfill.
- A number of judicial decisions have also influenced the process. The most recent

decision, made by the Puerto Rico Supreme Court, stating that the Commonwealth and the Federal government have not occupied the ground in relations to the regulation of coal ash. As such, the Peñuelas municipality's ban on the use of coal ash for construction and deposition is valid and sustained.

- The Puerto Rico Supreme Court issued a ruling on December 19, 2016 affirming a Peñuelas municipal ordinance that prohibits the use of coal ash as fill material and its deposit on lands within the territorial limits of the municipality.
- The Puerto Rico Supreme Court held that the ordinance enacted by the Municipality of Peñuelas prohibiting the use of coal ash as construction fill material is valid and enforceable based on the powers granted by the Autonomous Municipalities Act.¹ According to the court, the ordinance does not contravene in any way the public policy of the Commonwealth of Puerto Rico nor the Consolidated General Permit issued by the Permits Management Office and EQB. This permit did not include any provision regarding the fill material to be used in the landfill construction. The court further concluded that there is not Commonwealth preemption because EQB has not regulated the use of manufactured aggregated from coal ash as construction material. The court noted that nothing prevents EQB from later exercising its regulatory power over this matter and occupy the field expressly.² The court also concluded that the ordinance does not apply exclusively to Ecosystems.
- Activists established a civil disobedience camp at the entrance of both landfills in Peñuelas and AES Puerto Rico and EC Waste have publicly sustained that the Puerto Rico Supreme Court decision does not apply to the disposal of CCRs in landfills, as they have resolutions and permits from EQB that comply with federal regulation. They also have insisted that they will reinstate AES coal ash disposal soon at the Municipality of Peñuelas.
- The mayor of Peñuelas has called upon the Police to establish order and assure that their ordinance, as well as the Supreme Court's decision, is respected.
- On December 22, 2016, EPA Headquarters sent a letter to AES confirming in writing that the pile of AGREMAX/coal ash at AES's power plant facility in Guayama is a "CCR Landfill" for purposes of EPA's CCR Rule.